APPENDIX A - EXCERPTS FROM THE RECORD APPENDIX [HEREINAFTER "R.A."][1]

[R.A. p. 3]

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

Hampden, ss: Superior Court Department
Springfield Division
Docket #87-1238

MARY E. LEONARD,

Plaintiff

v.

COMPLAINT

TOWN OF BRIMFIELD
and CYNTHIA K. POWERS,
Individually and as
Chairperson of the
BRIMFIELD CONSERVATION
COMMISSION,

Defendants

---

[1] Typographical errors contained in the Record Appendix are reproduced herein without correction or notation.

Appendix A

PARTIES

1. The Plaintiff, MARY E. LEONARD, is a resident of the Commonwealth of Massachusetts and resides at 16 Meadowbrook Lane, Town of Palmer, County of Hampden.

2. The Defendant, TOWN OF BRIMFIELD, is a town duly incorporated under the laws of the Commonwealth of Massachusetts.

3. The Defendant, CYNTHIA K. POWERS, is the Chairperson of the Brimfield Conservation Commission, and is a resident of Hampden County, residing on Monson Road, Brimfield, Massachusetts.

BACKGROUND

4. The Plaintiff, MARY E. LEONARD, is the owner of record of a [R.A. p. 4] parcel of property located on Dunhamtown-Palmer Road in the Town of Brimfield. Said property being more commonly known as Lot # 12 thereon. Further, said property is described as set forth in a deed recorded in the Hampden County Registry of Deeds, Book 6335, Page 120.

5. The Plaintiff, MARY E. LEONARD seeks to construct a single family dwelling on her property, others in similar circumstances have duly been permitted to built without interference from the Town of Brimfield. Plaintiff

says that a building permit #8726 was issued her on March 30, 1987 by Jack Keough, Building Inspector, Town of Brimfield. That the Defendant Cynthia K. Powers exercised undue influence such that said permit was revoked based upon Flood Plain zoning requirements. At all times relevant to this action she had knowledge that said zoning had not been enforced previously by the Town of Brimfield and thereon sought to have said zoning selectively, unreasonably, arbitrarily and discriminately enforced against the Plaintiff.

6. Plaintiff alleges that the building permit issued to her on March 30, 1987 was revoked as a result of such discriminatory, unreasonable, and arbitrary application of said poorly defined and previously unenforced zoning requirement. A copy of said revocation is attached hereto as Exhibit "A". Further, that the Defendant, Town of Brimfield, had actual knowledge that the discharge of great volumes of water onto the Plaintiff's land was illegally damaging the Plaintiff. This action has caused and continues to cause irreparable harm to the Plaintiff and substantial monetary damages.

7. Plaintiff states that the overlay boundaries of said zone substantially exceed the 500 year flood plain as established on the Flood Insurance Rate Map as established by the Army Corp of Engineers, hereinafter referred to as F.I.R.M., and said boundaries have neither been published nor previously applied to others similarly located pursuant to the issuance of building permits and/or special permits.

Appendix A

8. Plaintiff states as a result of the discriminatory enforcement [R.A. p. 5] of zoning by-law VI-C she was coerced into making application for a special permit. That after due application the Zoning Board of Appeals held hearings in compliance with M.G.L. Chapter 40A and its applicable sections. That on June 2, 1987 the Board issued a decision which had the effect of "substantially taking" a great part of the Plaintiff's land. Said "taking" ignores the F.I.R.M. standards and operates to deprive Plaintiff of the use of Lots C & B of Lot 12 for residential use.

9. The action of the Zoning Board of Appeals was appealed in the Hampden County Superior Court on or about June 17, 1987. Said appeal was duly served and alleges that the Board exceeded its authority as a matter of law and fact. See Exhibit "B" [Complaint] and Exhibit "C" [Decision of the Zoning Board of Appeals].

COUNT I

10 This Count alleges injuries to Realty Caused by Improvements not Constituting a Taking.

11 The Plaintiff realleges and incorporates by reference all the allegations made in Paragraphs 1 through 9 of the Complaint.

12. The Defendant, Town of Brimfield, through the maintenance of a culvert system has artificially channelled great amounts of water onto the Plaintiff's land. Said water

has caused injury to said land by creating a "wetland" area and thereby restricting certain building rights that the Plaintiff would otherwise enjoy.

13. The Plaintiff says that the Town of Brimfield has no easements upon her property which would allow for the artificial channelling of water onto her property.

Wherefore, the Plaintiff, pursuant to M.G.L.A. Chapter 79, Section 9, demands judgment that the loss, injury, and damage sustained by her on [R.A. p. 6] account of said acts, be inquired into, determined and ascertained, and that damages be assessed therefor, and that the trial for this Count for the assessment of her damages may be made by jury.

COUNT II

14. This Count alleges Damages for Injuries to Property caused by acts in Pais.

15. The Plaintiff realleges and incorporates by reference all the allegations contained in Paragraphs 1 through 13 of the Complaint.

16. The Defendant, Town of Brimfield, in pursuance of the decision of the Zoning Board of Appeal has effectuated a "taking" of the Plaintiff's lands. This "taking" while allegedly grounded upon health and safety considerations is primarily resultant from the Defendant's

illegal conduct in artificially channelling large volumes of water onto the Plaintiff's land.

17. At the time of said "taking" the land of the Plaintiff was free from all encumbrances.

18. Plaintiff further alleges said "taking" was undertaken in "bad faith" and is therefore invalid.

19. By reason of said acts of the Defendant, Town of Brimfield, the Plaintiff is deprived of the use of a large part of said land, and the value of the land has been greatly diminished, whereby the Plaintiff has suffered great damage.

WHEREFORE, the Plaintiff, pursuant to M.G.L.A. Chapter 79, Section 10, demands judgment that the loss, injury, and damage sustained by her on account of said acts of the Defendant, Town of Brimfield, be inquired into, determined and ascertained, and that damages be assessed therefor, and that [R.A. p. 7] the trial of this complaint for the assessment of her damages may be by jury.

COUNT III

20. The Plaintiff realleges and incorporates by reference all the allegations contained in Paragraphs 1 and 19 of the Complaint.

21. This Count alleges a claim under the Fifth Amendment, "Just Compensation Clause" of the United

States Constitution and made applicable to the State corporate body through the operation of the Fourteenth Amendment "Due Process Clause" of the United States Constitution.

22. Plaintiff alleges that the aforementioned "taking" is subject to the "Just Compensation Clause" of the Fifth Amendment of the United States Constitution and is applicable to the state municipal corporation [Town of Brimfield] through the operation of the "Due Process Clause" of the Fourteenth Amendment to the United States Constitution. That regardless whether said regulatory "taking" is temporary or permanent the Plaintiff is entitled to compensation.

Wherefore the Plaintiff, demands judgment for the temporary or permanent "taking" of of her land.

COUNT IV

23. This Count states a claim for the violation of the provisions of M.G.L.A. Chapter 12, Section 11 [I]

24. The Plaintiff realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 22 contained in the Complaint.

25. Plaintiff was originally informed that no building permit [R.A. p. 8] would be issued because of an unfavorable recommendation by the Town of Brimfield

Conservation Commission. See Exhibit "D" attached hereto. Said recommendation is not mandated by town by-law; thereon legal counsel for the Plaintiff sought the issuance of a building permit. On the advice of Town Counsel and action by the Board of Selectmen said permit was issued by the building inspector. Plaintiff alleges that thereafter Defendant, Cynthia K. Powers and members of the Conservation Commission entered into a joint venture and sought through coercion and intimidation to have the permit revoked pursuant to the discriminatory use of zoning restrictions.

26. The actions of the Defendant, its agents, employees and/or officials have interfered by such intimidation and coercion with the Plaintiff's use and enjoyment of her property as guaranteed by the Constitutions of the United States of America and the Commonwealth of Massachusetts and the general laws of the Commonwealth of Massachusetts all in violation of the provisions of M.G.L. Chapter 12, Sections 11 [H] [I].

WHEREFORE, the Plaintiff demands:

1. The Court permanently enjoin the Defendant, its agents, employees, and/or officials from discriminating and interfering with Plaintiff's rights to the enjoyment of her property as constitutionally protected.

2. That damages be assessed by the Court pursuant to the rights as set forth in M.G.L. Chapter 12, Section 11 [I] and that the Court further award costs of the

litigation and reasonable attorney fees thereon.

3. Such other relief as the Court shall deem necessary and proper.

THE PLAINTIFF
MARY E. LEONARD

[R.A. p. 9]

GREG T. SCHUBERT
Plaintiff's Counsel
Ten Mechanic Street
Worcester, MA 01608
[617] 798-2040

Dated July 8, 1987

Appendix A

[R.A. p. 10]

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

Hampden, ss: Superior Court Department
Springfield Division
Docket # 87-1238

MARY E. LEONARD,

Plaintiff

v.

TOWN OF BRIMFIELD and CYNTHIA K. POWERS, Individually and as Chairperson of the BRIMFIELD CONSERVATION COMMISSION,

Defendants

PLAINTIFF'S PRE-TRIAL MEMORANDUM

1. NATURE OF THE CASE

On or about June 30, 1986, the Plaintiff, Mary E. Leonard entered into purchase and sale contract with

Appendix A

Quaboag Valley Nursery Inc. for the purchase of approximately 16 acres of land located on the westerly side of Dunhamtown Road in the Town of Brimfield. The land was zoned residential/agricultural. At the time of the suggested sale, the property had been held in Chapter 61A status by the seller. The plaintiff, Leonard always intended to use the property for the construction of houses. She gave value for said property based on a residential usage. The property because of said status was subject to right of first refusal by the Town.

On December 2, 1986, the Brimfield Conservation Commission passed a motion to exercise the right of first refusal. See: Exhibit [R.A. p. 11] "A" attached hereto and incorporated by reference. Previously, Chairperson, Cynthia K. Powers, a defendant herein, had sought to procure this same land for the Quaboag River Watershed Association, Inc. She on two different occasions attempted to secure said land for alleged conservation purposes, This even after being rejected by the owners on the initial attempt and told they had no interest in dealing with governmental sales. Town counsel, Bruce Clarkin, by letter dated April 21, 1987, indicated that in his opinion the Watershed Association had a "financial interest" in the property bought by Leonard in July and August of 1986. Counsel further characterized the acts of Ms. Powers as that of an "employee" of the Watershed corporation. See: Exhibit "B" attached hereto and incorporated by reference.

Ms. Leonard prior to the purchase of the property had a title examination performed by Ellis Title Company of Springfield, Massachusetts. That title examination did not

reveal that the property was situated in a flood plain zone. The Town of Brimfield had failed to comply with the filing requirements in the Registry of Deeds as to the boundries or even the existence of said zone. Thereon, the plaintiff was not alerted to any zoning impediment existent on her property other than normal frontage and size requirements. Additionally, other single family dwellings existed along the westerly portion of Dunhamtown Road and at lower elevations on the easterly side of the road. As a result of the Town's failure to comply with state law, Ms. Leonard had no reason to believe that the land she was about to purchase was other than of a residential character. She purchased a modular kit home from a Canadian supplier. She procured builders for the erection of the house. Then she was informed of the flood plain zoning requirement. Seemingly, the flood plain zoning was available only on a map on the wall of the building inspector's office. Ms. Leonard will also offer evidence to prove that all the abutters and abutters to the abutters single family structures on [R.A. p. 12] Dunhamtown Road were never required to secure any variances or special permits pursuant to the flood plain zoning. She will further offer evidence that the building inspector, Jack Keough, even after notification by plaintiff's counsel, of violations under Chapter 40A, section 7 and Brimfield zoning By-Law VI-C failed to act against any property owner other than Ms. Leonard. Further evidencing discrimination, a request by the Brimfield Planning Board requesting the same exercise of police power against Ms. Leonard was immediately honored. See Exhibits "C" & "D" attached hereto and incorporated by reference.

Appendix A

On March 21, 1987 the Conservation Commission knowing that the plaintiff did not consider the property to be a wetland and having no by-law obligation to consult the commission; [other than that "wetness" which was attributable to the Town's illegal water dumping onto the plaintiff's property] it nevertheless sought to impede the plaintiff's plan of commencing construction. This was accomplished through resort to police power zoning regulation. The dumping and/or illegal channeling of water from the culvert system then became the subject matter of Hampden County Superior Court docket number 87-592. A matter which was eventually settled between the parties for a sum of sixty thousand dollars. See: Exhibit "E" attached hereto and incorporated by reference.

On March 24, 1992, counsel for the plaintiff sent a letter under the provisions of Chapter 258, sections 4. See: Exhibit "F" attached hereto and incorporated by reference. The purpose of such letter was to comply with the Massachusetts Tort claims act pursuant to any **negligent** [emphasis added] acts of the Commission or its members. Service was had on Cynthia K. Powers, Chairperson, Br .nfield Conservation Commission. The appropriateness of this service is supported by **Ponchita v. Amherst-Pelham Regional School Committee**, 410 Mass 396, 572 N.E. 566, [1991]. Subsequent events however, showed this requirement inapplicable to the suit which is the [R.A. p. 13] subject of this action. Ms. Powers conduct as alleged in the complaint was "intentionally tortious" and thereby excluded from the chapter's requirements by section 10 [c] thereof. Additionally, Ms. Powers was sued individually by the

plaintiff, not just in her capacity as chairperson or member of the Commission and thereon is not amenable to statutory tort claim procedures. Section 10 [c] states:

> The provisions of sections one to eight, inclusive, shall not apply to:
> [c] any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations.

The complaint specifically uses the words of art "entered into a joint venture and sought through `**coercion and intimidation**' [emphasis added] to have the permit revoked pursuant to the discriminatory use of zoning restrictions."

A permit was issued by the building inspector Jack Keough on March 30, 1987, it was revoked on April 2, 1987 due to alleged violations of construction in a flood plain zone and "wetlands" considerations. The Conservation Commission on the same day as the permit was issued held a meeting and contrary to the advice of Town Counsel sought to have the project stopped on alleged violations of zoning violations. See: Exhibit "G" attached hereto and incorporated by reference.

The plaintiff was subsequently forced to incur both severe economic injury in the form of added expense in not beginning the construction of her residence until February 1989 and the loss of property rights and their usage. This injury continued throughout the process of her application for

the special permits necessary for the construction of her residence. Then the plaintiff was further delayed and dealt increasing economic harm by the Zoning Board of Appeals when by its decision of September 10, 1988 it enforced against the [R.A. p. 14] plaintiff a twelve hundred year [1200] flood plain restriction. This restriction also necessitated plaintiff's procurement of a variance to comply with lot set-back requirements. All said actions added to the delay experienced by the plaintiff. This enforcement has been characterized by the plaintiff in this action as a "taking". Said characterization rests on the premise that a one hundred year flood plain is held sufficient throughout the Commonwealth of Massachusetts. Uncontroverted expert testimony in Superior Court action 87-1077 [which this Court heard on the propriety of said zoning regulation] established that only one other town in the Commonwealth enforced a five hundred year flood plain. Evidence will be offered that some twelve and one tenth [12.1] acres of the plaintiff's land are being affected by the enforcement of the flood plain zoning decision. Ostensibly, four building lots would accrue if a one or five hundred year flood plain was recognized by the defendant, Town. The plaintiff contends that the health and safety police powers are being used as a subterfuge for governmental mandating of natural condition/open space considerations. The original goals of the Conservation Commission are being enforced through zoning police power--all in contravention to constitutional mandates.

The plaintiff under M.G.L. Chapter 79, sections 9 & 10 has moved to recover for this "constructive" taking. The plaintiff's position is that while the Courts [particularly this

Court] have upheld the validity of the zoning regulation as an appropriate exercise of home rule doctrine--the Town cannot have the advantage of enforcing the regulation without paying compensation for the resultant diminuation in value of the plaintiff's property. This proposition is supported by both state and federal constitutional law. The prior actions of the Town gave the plaintiff every reasonable expectation that she would be able to use the property which she had purchased for residential building sites in conformance with frontage and applicable acreage requirements. The Plaintiff relies heavily on the recent [R.A. p. 15] decision of the United States Supreme Court in **David H. Lucas v. South Carolina Coastal Council**, 60 LW 4842 [June 29, 1992]. See: Exhibit "H" attached hereto and incorporated by reference. Plaintif further intends to rely on **Cayon v. City of Chicopee** 277 N.E. 2d 116. As to the inapplicability of M.G.L. Chapter 258, section 4 the plaintiff relies on **Asiala v. City of Fitchberg** 24 Mass. App. Ct. 13, 505 N.E. 2d 575 [1987] as to the aforementioned notice requirement as to M.G.L. Chapter 79, section 9 & 10 relief. Suffice it to say, that the plaintiff alleges that no cause of action enumerated in her complaint falls under the purview of the Massachusetts Tort Claims Act.

Plaintiff says that the Town of Brimfield can be held liable under the theory expressed in **Schleissner v. Town of Provincetown**, 27 Mass. App. Ct. 392, 538 N.E.2d 995 [1989] especially in light that the Town has never attempted any resolution of the problem of water run-off onto the plaintiff's property. Even as of this date, the defendant town has not sought easements to alleviate this problem. The

Town, in fact, promotes its keeping the land in its natural condition through ignoring its illegal and continuing water nuisance. The release executed by the plaintiff excludes water damages occurring as to "injury" [emphasis added] to the land. It does not relate to an alleged "taking" by making the land a "unusable wetland" or virtual "marsh". The Town in furtherance of its negotiated settlement of action 87-592 blocked two or four culverts channeling water onto the plaintiff's property, allowing plaintiff to construct a residence on a small portion of the total property. The Town now, in fact, channels all the water that was diverted onto the plaintiff's property by four culverts with two culverts. This localizes the effect, enhances the wetness of the property and the plaintiff claims operates to act as a "taking" within the meaning of both the United States Constitution and the Massachusetts Declaration of Rights.

With regards to Count IV of the plaintiff's complaint alleging [R.A. p. 16] civil rights violations, the plaintiff intends to rely on **Bell v. Mazza**, 394 Mass. 176 181-182, 474 N.E.2d 1111, 1114 [1985]. Clearly, whether Ms. Powers was acting under color of law [in her capacity as chairperson of the Conservation Commission] is irrelevant. Plaintiff even acknowledges that a wrongful taking by a town or its agents is insufficient to show a civil rights violation. **Pheasant Ridge Assoc. Ltd. Partnership v. Town of Burlington**, 399 Mass. 771, 506 N.E.2d 1152 [1987]. The plaintiff will show that the defendant, Cynthia K. Powers had an interest in the land prior to its acquisition and that she intentionally used threats, coercion and/or intimidation to attempt to restrict building on the plaintiff's lands. That she

foremost sought to have the land remain as open space in its natural condition, contrary to the rights of the plaintiff to the enjoyment of those lands within the boundaries of appropriate police power regulation.

The Plaintiff support the counts of her action primarily on the theory as expressed in the **Lucas** case, when Justice Scalia opined for a 6 to 3 majority: . . "affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." 60 LW 4846 The plaintiff alleges that the Supreme Court has espoused a standard wherein a landowner may **upon reasonable expectations** [emphasis added] expect that his/her land may be used for a particular purpose. The defendant, Town, in this suit gave the purchaser no warning either in compliance with the statutory requirements or restriction of adjacent residential structures that the use of this land did not lend itself to single family residential buildings.

Appendix A

[R.A. p. 19]

RELEASE OF ALL DEMANDS

28 October 1988

In consideration of SIXTY THOUSAND DOLLARS ($60,000.00) to us paid by TOWN OF BRIMFIELD AND UNITED COMMUNITY INSURANCE COMPANY, both hereinafter called Second Party for purposes of this release, the receipt whereof is hereby acknowledged we do hereby remise, release and forever discharge the said Second Party of and from all debts, demands, actions, causes of action, suits, accounts, covenants, contracts, agreements, damages and any and all claims, demands and liabilities whatsoever of every name and nature, both in LAW and in EQUITY, which against the said Second Party or their heirs, successors and assigns we now have or ever had from the beginning of the world to this date and more especially on account of all claims brought in the Superior Court of Hampden County Case #87-592 entitled MARY E. LEONARD VS. TOWN OF BRIMFIELD. This release excludes case #87-1238 except as to water channelling claims. (See indemnification agreement dated 10/28/88).

This release will also nullify any and all Chapter 93A claims brought against the Town of Brimfield and/or United Community Insurance Co. in the case of Mary E. Leonard v. Town of Brimfield, Case # 87-592.

Appendix A

Witness....hand and seal
Signed in the presence of

s/ Mary E. Leonard
. . . . . .
MARY E. LEONARD

. . . . . .

s/ Greg T. Schubert
. . . . . .
GREG T. SCHUBERT

EXHIBIT A

Appendix A

[R.A. p. 20]

INDEMNIFICATION RELEASE

In consideration of the payment made by UNITED COMMUNITY INSURANCE COMPANY on behalf of the TOWN OF BRIMFIELD in settlement of the claims brought by MARY E. LEONARD in Hampden County Superior court case #87-592, as evidenced by a release, a copy of which is attached hereto and marked "A", the parties hereto agree to indemnify and save harmless the UNITED COMMUNITY INSURANCE COMPANY from any and all claims, losses, damages or expenses arising from or resulting from claims brought by Mary E. Leonard against the Town of Brimfield in Hampden County Superior Court case #87-1238 and from any and all claims, losses, damages or expenses which may occur in the future to the property of the said Mary E. Leonard resulting from the channelling of water onto her property located on Dunhamtown-Palmer Road in the Town of Brimfield. This indemnification will run for one year from the date of execution of this release.

Witness our hands and seals this 28th day of October 1988.

s/ Edward Webb	s/ Mary E. Leonard
_____	_____
	MARY E. LEONARD
s/ (illegible)	s/ Greg T. Schubert
_____	_____
	GREG T. SCHUBERT

Appendix A

[R.A. p. 59] (Trial Transcript)

Testimony of Mary E. Leonard

8

Dunhamtown Road, Brimfield.

Q. Do you know how to spell it?

A. D-U-N-H-A-M-T-O-W-N.

Q. It's pronounced Dunnington (phonetic)?

A. I say Dunhamtown.

Q. And do you own real estate on that road, Miss Leonard?

A. Yes.

Q. And does it have an address number?

A. My address is 510.

THE COURT: I'm sorry what was the number?

THE WITNESS: 5-1-0

Q. (By Mr. Silverman) And when did you purchase this property?

A. I started purchasing it July or August of 1986. It was finalized in December of 1986.

Q. December of '86 is when you got the deed?

A. Yes.

Q. And who did you buy it from?

A. Quaboag Valley Nurseries.

Q. And at the time you bought it, Miss Leonard, can you describe it for the Court?

Appendix A

[R.A. p. 60]

A. It's 16 acres, little over 16 acres parcel. It's on the river that's off of Route 20.

Q. And what does it border?

A. It borders the Quaboag River on one side and it's on Dunhamtown Road.

Q. On the other side?

A. Yes.

Q. And I take it at the time you bought it, it was not subdivided in any way?

A. No.

Q. Was there a real estate broker involved in the transaction?

A. Yes.

Q. And who was that?

A. Tom Haley.

Q. What's his name?

A. Thomas Haley.

Q. Haley?

A. H-A-L-E-Y.

Q. Was there another broker?

A. Mr. Niserq.

Q. N-I-S-E-R-Q?

A. Yes.

Appendix A

[R.A. p. 93]

of the land?

A. When the building permit was submitted, it was indicated that it was going to be less than the 16 acres. And, in fact, the building inspector, I assume, was shown by Mr. Simcus where the lot was going to be where the house was going to be since we had to have the well put in. So as far as the building inspector, I assume he would have been concerned it was specific where the house was to be built.

Q. My question to you is that the Zoning Board of Appeals allowed you to build your house on a portion of the land?

A. Yes.

Q. A portion of the 16 acre parcel?

A. Yes.

Q. And you ultimately did construct your house on a portion of that 16 acre parcel?

A. Yes.

Q. And when did you complete your construction?

A. August of 1989.

Q. Now, with respect to the remaining portion of that land, is it fair to say the rest of the 16 acre parcel -- it is it fair to say it may be used for [R.A. p. 94] recreational purposes?

A. Yes.

Q. Is it fair to say it can be used for horticultural or agricultural purposes, should someone decide to put it to you?

A. Yes.

MR. HEWIG: Thank you very much. No further questions, Your Honor. ***

[R.A. p. 109]

Testimony of Jack Keough

58

Q. So the bylaws say if you're in the flood zone and want to build a house, you have to go for a special permit in front of the Zoning Board of Appeals?

A. Correct.

Q. And is isn't it fair to say, prior to the Leonard application, there had been applications to build on Dunhamtown Road that did not require a special permit from the Zoning Board of Appeals?

THE COURT: Are you talking about being --

MR. HEWIG: Objection.

THE COURT: Sustained.

THE WITNESS: Can I answer that?

THE COURT: Are you talking about after grandfathering it?

MR. SILVERMAN: No, prior to that. And even then people were allowed to build houses without going through what Ms. Leonard went through.

THE WITNESS: That's because there was a previous building inspection, previous to 1986.

MR. HEWIG: Your Honor, I don't think [R.A. p. 110] there was a question before the witness,

first of all. And secondly, if I may, the basis for my objection at this point is that the issue of whether this permit was arbitrarily or capriciously issued in comparison with what had gone on before has already been litigated through the SJC under Chapter 40A.

THE COURT: I understand, but I think Mr. Silverman is trying to understand if this is the taking of or the first time the board established the elevation of the 370 feet. I assume that's the point to get across. And that's been testified. This was the first time the board established this 370 foot elevation.

MR. SILVERMAN: I want to take it a step further to show houses were build on this street.

THE COURT: I'll allow it not to question the special permit, but whatever weight it has to the issue of where we are involved in a taking here.

Appendix A

[R.A. p. 171]

TOWN OF BRIMFIELD BUILDING DEPARTMENT
COMMONWEALTH OF MASSACHUSETTS
01010

87-1238H
Exh #2a
12-7-93

Jack Keough
Building Inspector
Town of Brimfield
Brimfield, Ma. 01010
April 2, 1987

Mary E. Leonard
40 Corey Colonial St.
Agawam, Ma. 01001

R.E. Building permit #8726 "Lot 12B" Dunhamtown Rd.
Brimfield

Dear Mary Leonard;

I am writing you in regard to the building permit I issued to Robert Simpkiss on March 30th. I have revoked

this permit for reasons you will find in the copy of a letter sent to Robert Simpkiss (enclosed). If you are aggrieved by this action please contact in writing Bruce Clarken/Town Counsel to request a hearing with this department.

Sincerely,

s/ Jack Keough
Jack Keough
Building Inspector

Enclosure

Appendix A

[R.A. p. 172]

TOWN OF BRIMFIELD BUILDING DEPARTMENT
COMMONWEALTH OF MASSACHUSETTS
01010

87-1238H
Exh #2b
12-7-93

Jack Keough
Building Inspector
Town of Brimfield
Brimfield, Ma. 01010
April 2, 1987

Robert Simpkiss
Fontaine Enterprises
25 Knox St.
Palmer, Ma. 01069

R.E. Building permit # 8726 'Lot 12B' Dunhamtown Rd.
Brimfield

Dear Robert Simpkiss;

As per our telephone conversation on April 2nd I am

revoking Building Permit #8726 dated March 30, 1987. The reason being: After further investigation I have determined that the lot owned by Mary E. Leonard, as represented on the building permit application, is located in the Town's designated Flood Zone, (according to the Town of Brimfield Zoning Map). Therefore by the Brimfield Zoning By-Law VI-C, Flood Plain Restrictions, I can not issue a building permit in this area without the approval of the Zoning Board of Appeals. Also, the lot size and location as represented on the application has not, (as of March 30th), been approved for subdivision by the Planning Board or registered with the Registry of Deeds. This also voids the application.

I have enclosed the application, septic permit, driveway permit and water test submitted. Also, a check for the permit fee has been returned to Attorney Greg Schubert, as the check was written by him.

If you are aggrieved by this action please contact in writing Bruce Clarken/Town Counsel to request a hearing with this department.

Copies of this letter have been forwarded to property owner Mary E. Leonard and Attorney Greg Schubert.

Sincerely,

s/ Jack Keough
Jack Keough
Building Inspector

Enclosures

Appendix A

[R.A. p. 175]

ZONING BOARD OF APPEALS
Brimfield, Massachusetts

TOWN OF BRIMFIELD
COMMONWEALTH OF MASSACHUSETTS

87-1238H
Exh #5
12-7-93

DECISION OF THE ZONING BOARD OF APPEALS FOLLOWING A DULY ADVERTISED PUBLIC HEARING ON MAY 4, 1987 ON THE PETITION OF MARY E. LEONARD REQUESTING A SPECIAL PERMIT FOR PROPERTY IN A FLOOD PLAIN DISTRICT ACCORDING TO THE TOWN OF BRIMFIELD'S ZONING MAP ON THE WESTERLY SIDE OF DUNHAMTOWN PALMER ROAD AND IS RECORDED IN THE HAMPDEN COUNTY REGISTRY OF DEEDS, BOOK 6335, PAGE 120, LOT 12.

The Petitioner applied for a zoning permit and was denied such because the Zoning Officer determined that Lot 12 as represented on the application is in a designated Flood Plain District according to the Town of Brimfield's official zoning map. The Brimfield Zoning-By-Laws state in Section

VI-C, Flood Plain Restriction, that a special permit is needed for uses otherwise permitted as set forth in Sections IV-A and IV-B. Before making a decision on the request, the Zoning Board of Appeals must determine that this property use in a flood plain district will not endanger the health and safety of the occupants.

A flood plain area is a fragile and extremely unpredictable part of our environment that has to be carefully scrutinized before it can be infringed upon by any individual for the purpose of habitation. The health and safety of the occupants, present and future is a concern of the board. However, the board must also consider any effects that the property use might have on the surrounding environment e.g. the river, the wetlands and also neighboring inhabitants.

After reviewing the property, holding a public hearing, and consulting Geographical Survey Maps, Hampden County Natural Resource Maps, Flood Insurance Rate Maps and the official Brimfield Zoning Map, we can derive the following:

1. Lot 12, 16.1 acres has an elevation of 360 feet at river level to approximately 400 feet elevation at the most north-easterly corner of the lot.
2. A large portion of lot 12 lies at an elevation of 360 feet to 365 feet.
3. Within this area of 360-365 feet elevation exists extensive wetlands - even to the uneducated eye.

With these observations in mind, the board feels that any property use within the 360 to 365 foot level would definitely endanger the health and safety of the occupants, effect the environments and possibly endanger neighboring inhabitants.

1. Flood crest levels of the river would create a hazard at the 360-365 foot level.

2. Septic systems within the 360-365 foot elevation would be rendered useless at flood crest levels and most likely contribute a pollutant to the environment. [R.A. p. 176]

3. Domestic water could be threatened at flood crest levels and septic system failures.

Taking these observations into consideration, the board finds that granting a special permit for property use of lot 12 would endanger the health and safety of the occupants. The use would also be a hazard to the environment and neighbors.

However, the board also feels that prohibiting property use of the entire area of lot 12 would be extreme and unfair to the petitioner. Any property use between the 360 to 365 foot elevation would be dangerous but with a five (5) foot safety factor; 370 foot elevation, the board feels property use could be utilized with safety to the occupants and also not pose an environmental hazard.

Therefore, the Zoning Board of Appeals grants a Special Permit for property use of lot 12 Dunhamtown Palmer Road with the following restriction:

Appendix A

1. Property use shall be limited to land at and above the 370 foot elevation mark.
2. This 370 foot elevation mark to be verified by the Brimfield Zoning Officer.
3. This decision must be recorded by the petitioner on Form 1094 with the Registry of Deeds.
4. Any action not taken on the decision within two years, deems this decision unfavorable.

Dated: 6-2-87

s/ Michael P. Koprowski
Michael P. Koprowski, D.D.S.
Chairman

s/ Arthur Bonneau
Arthur Bonneau

s/ Donald Fitzgibbons
Donald Fitzgibbons

6-15-87
A true copy, attest
s/ Doris Bodlaseh
TOWN CLERK

Appendix A

[R.A. p. 179]

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 87-1238H

MARY E. LEONARD
Plaintiff

v.

TOWN OF BRIMFIELD and
CYNTHIA K. POWERS,
Individually and as
Chairperson of the BRIMFIELD
CONSERVATION COMMISSION,
Defendants.

NOTICE OF APPEAL

The plaintiff, MARY E. LEONARD, appeals from the judgment entered against her on Counts I through IV of her complaint Judgment was entered on the 13th day of April 1994 by John F. Murphy.

Appendix A

MARY E. LEONARD
by her Attorney,

s/ Jean M. Fielding

Jean M. Fielding BBO# 558083
268 Adams Road
Greenfield, MA. 01103-1360
Tel. (413) 773-5494

Dated: May 2, 1994

APPENDIX B - COVER SHEET OF APPLICATION FOR LEAVE TO APPEAL, IN THE CASE OF *K&K CONSTRUCTION, INC., J.F.K. COMPANY, and RESORTS AND COMPANY V. DEPARTMENT OF NATURAL RESOURCES*

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
[Jansen, P.J., and Taylor and J.P. Noecker, J.J.]

K&K CONSTRUCTION, INC. J.F.K. COMPANY, and RESORTS AND COMPANY,	Supreme Court No.
Plaintiffs-Appellees	Court of Appeals No. 168393
v.	Lower Court No.
DEPARTMENT OF NATURAL RESOURCES,	88-012120-CM
Defendant-Appellant	

APPLICATION FOR LEAVE TO APPEAL

FRANK J. KELLEY
Attorney General

Appendix B

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Kevin T. Smith (P32825)
Assistant Attorney General
Attorneys for Defendant-Appellant
Mason Building, 8th Floor
P.O. Box 30028
Lansing, MI 48909
(517) 373-7540

FILED
JUL 2 1996
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

Dated: July 2, 1996